REGULATORY REFORM/Glenn-Chafee Substitute

SUBJECT: **Comprehensive Regulatory Reform Act of 1995 . . . S. 343. Levin (for Glenn/Chafee) substitute amendment No. 1581 to the Dole/Johnston substitute amendment No. 1487.**

ACTION: AMENDMENT REJECTED, 48-52

SYNOPSIS: As reported, S. 343 will make changes to reform the regulatory process.

The Dole/Johnston substitute amendment would modify the bill in accordance with suggestions made by Senate Democrats, the Administration, and the American Bar Association. The amendment would: recodify and modify the Administrative Procedures Act (APA); impose judicially reviewable obligations on Federal agencies to craft rules in which the benefits justify the costs and to use peer reviewed, standardized risk assessments; expand the Regulatory Flexibility Act; reform the Delaney Clause; and strengthen congressional oversight.

The Levin (for Glenn/Chafee) substitute amendment to the Dole/Johnston substitute amendment would enact more modest changes to the regulatory process than would the Dole/Johnston substitute amendment. Differences include those listed below.

Major rule: Both amendments would cover rules of $100 million or more in cost. However, unlike the Dole/Johnston amendment, the Glenn/Chafee amendment:

- would not cover rules with costs of less than $100 million that impose a significant burden on small entities;
- would not cover agency statements that act like rules and that impose costs of $100 million or more (in other words, statements that are rules in everything but name only);
- would not exempt regulations pursuant to international trade laws, customs tariffs, the public debt, Federal Energy Regulatory Commission certification, or securities or commodities (though it would exempt the Federal Election Commission and the Federal Communications Commission);
- would not allow judicial review of an Office of Management and Budget (OMB) major rule designation;
- would only allow judicial review of an agency's designation of a rule as being a major rule using a "clear and convincing" standard of proof (instead of an "arbitrary and capricious" standard); and

(See other side)

YEAS (48)

Republicans (5 or 9%)	Democrats (43 or 93%)	
Chafee	Akaka	Inouye
Cohen	Baucus	Kennedy
Jeffords	Biden	Kerrey
Snowe	Bingaman	Kerry
Specter	Boxer	Kohl
	Bradley	Lautenberg
	Bryan	Leahy
	Bumpers	Levin
	Byrd	Lieberman
	Conrad	Mikulski
	Daschle	Moseley-Braun
	Dodd	Moynihan
	Dorgan	Murray
	Exon	Nunn
	Feingold	Pell
	Feinstein	Pryor
	Ford	Reid
	Glenn	Robb
	Graham	Rockefeller
	Harkin	Sarbanes
	Hollings	Simon
		Wellstone

NAYS (52)

Republicans (49 or 91%)		Democrats (3 or 7%)
Abraham	Helms	Breaux
Ashcroft	Hutchison	Heflin
Bennett	Inhofe	Johnston
Bond	Kassebaum	
Brown	Kempthorne	
Burns	Kyl	
Campbell	Lott	
Coats	Lugar	
Cochran	Mack	
Coverdell	McCain	
Craig	McConnell	
D'Amato	Murkowski	
DeWine	Nickles	
Dole	Packwood	
Domenici	Pressler	
Faircloth	Roth	
Frist	Santorum	
Gorton	Shelby	
Gramm	Simpson	
Grams	Smith	
Grassley	Stevens	
Gregg	Thomas	
Hatch	Thompson	
Hatfield	Thurmond	
	Warner	

NOT VOTING (0)

Republicans (0)	Democrats (0)

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

- would only allow that review when the final rule was issued.

Cost-benefit analyses: Under both amendments, agencies would conduct cost-benefit analyses of rules costing more than $100 million. However, under the Glenn/Chafee amendment, they would not be required to base their rules in any way upon those analyses. In other words, cost-benefit analyses would not be "decisional criteria." Decisional criteria are absent from the Glenn/Chafee amendment.

Risk assessments: Both amendments have risk assessment provisions, but under the Glenn/Chafee amendment:

- only 11 agencies would be required to conduct risk assessments of major rules;
- those assessments would be peer reviewed unless the Office of Information and Regulatory Affairs (OIRA) gave approval to forgo peer review; and
- agencies would not be required to base their rules in any way upon their risk assessments.

Agency review of existing regulations: The review process in the Glenn/Chafee substitute amendment would be similar to the review process provided in the Dole/Johnston substitute amendment, except:

- judicial review would be limited to whether an agency had made a review schedule or not (the Dole Johnston amendment would allow judicial review to challenge as arbitrary and capricious an agency's choices of rules to put on its review list);
- review of agency interpretive rules or policy guidances would not be allowed; and
- a full rulemaking would be required to repeal a rule on the schedule (the Dole/Johnston amendment would provide for the automatic repeal of a rule if a review had not been completed on schedule and if statutorily allowed, though an extension of 2 years could be obtained, during which time a court order could be sought to force compliance).

Judicial review: In a proceeding on a final rule, both amendments would allow a court to consider, as part of the overall record, whether an agency's failure to make a required cost-benefit analysis or risk assessment made a material difference in the rule sufficient to force a change. However, the Glenn/Chafee amendment would not require the use of analyses and assessments as decisional criteria in rulemaking, so a court would not have to give any more weight to a failure to conduct them then to a failure to include any other document in the rule's record, such as a document containing comments from the public. A greater difference between the two amendments is that the Glenn/Chafee amendment would forbid a review of the adequacy of a required analysis or risk assessment. The Dole/Johnston amendment, in contrast, would allow a review to determine whether a failure to act in accordance with an analysis or whether a proven defect in the analysis created a defect in a rule sufficient to find it arbitrary and capricious.

Petitions: The only petition authority allowed under the Glenn/Chafee substitute would be to force an agency to issue a review schedule, as described above. Unlike the Dole/Johnston amendment, it would not provide for petitions:

- to add existing regulations to a review schedule;
- to comply with a rule by an alternative method than the one prescribed;
- to require review of a major free-standing risk assessment; or
- to review a listing on the Toxic Release Inventory.

Regulatory Flexibility Act: The Glenn/Chafee substitute would permit judicial review of an agency's analysis under this Act, as would the Dole/Johnston substitute though the standard of review would be higher under the Glenn/Chafee amendment. Unlike the Dole/Johnston amendment the Glenn/Chafee amendment:

- would not permit judicial review of an agency's failure to prepare a regulatory flexibility analysis; and
- would not require agencies to seek rules that minimize their economic impact on small businesses and small governments.

Congressional review: The Glenn/Chafee amendment would allow congressional review of major rules with exceptions (instead of all rules with exceptions, as provided in the Dole/Johnston amendment).

Other reforms dropped by the Glenn/Chafee substitute amendment include Delaney clause reform, agency consent decree abuse curtailment, and the affirmative defense for persons reasonably relying on official statements of agency policy.

Those favoring the amendment contended:

There are plenty of regulatory horror stories. Some are accurate and some are not. There is more than enough evidence for us to be convinced of the fact that the regulatory process is broken and needs fixing. The Governmental Affairs Committee spent several months earlier this year considering a bill by Senators Roth and Glenn which it finally passed on a unanimous, bipartisan vote of 15-0. That bill had cost-benefit analysis, risk assessment, legislative review, and a procedure for the review of existing rulings. The Glenn/Chafee substitute amendment, with a few modifications, contains the provisions of the Roth/Glenn bill.

The Glenn/Chafee substitute would accomplish many significant reforms. First, it would require cost-benefit analysis for every major rule. Second, it would require agencies to select regulatory options that provide the greatest flexibility for compliance, and to recognize the compliance difficulties faced by small businesses and small towns. Third, it would require the OMB to review agencies' cost-benefit studies in an open process. Fourth, it would establish a procedure for Congress to consider major rules before they are promulgated, to give Congress a chance to stop poorly drawn rules before they go into effect. Fifth, it would establish a risk assessment process with peer review to keep it honest. Sixth, it would give the courts authority to enforce the review requirements of the Regulatory Flexibility Act. All of these requirements are new--anyone who says that the Glenn/Chafee amendment would do

little more than restate current law is therefore mistaken.

The Dole/Johnston substitute amendment, on the other hand, would enact such strict controls on the regulatory process that it would effectively kill any ability to pass effective regulations to protect health, safety, and the environment. Further, it would make it possible to eliminate all the progress that has been made in the last several decades on these fronts. It would not reform regulation; it would end it. The debate over the past week has proved this point. When confronted with the challenge that their bill would threaten important health safety rules that are now pending, dealing with food safety, mammograms, and drinking water, our colleagues first denied there was any problem, then attempted to have us accept symbolic solutions. In the end, they accepted some protections for food safety and mammograms, but they would not vote in favor of safe drinking water. Senators who fought us on these amendments are not in favor of poisonous food, breast cancer, or polluted water; they have just not come to grips with the fact that the Dole/Johnston amendment, as offered, would allow all three.

We think part of the problem is that the Dole/Johnston amendment was hastily drawn up. Instead of being reported by a committee after sober deliberations, this amendment was stitched together after weeks of behind-the-scenes bickering and horse-trading to gain particular Senators' support. The resulting confusion was aptly illustrated on the question of whether the decisional criteria created a super-mandate. Our colleagues insisted it did not, but then added clarifying language that in any case in which the cost-benefit and other requirements in this bill directly conflicted with underlying law, underlying law would trump them. Similarly, when the discussion turned to the proper threshold level, we found confusion and inconsistency, and the end result was that the threshold was doubled from $50 million to $100 million.

The main problem with the Dole/Johnston substitute amendment is that it would impose burdens on agencies they could not meet. Agencies would be required to defend rule after rule in court, on issue after issue, and would have to perform a prohibitive number of expensive analyses that they have neither the time nor the money to perform. If they failed to keep up, as they certainly would, they would be unable to issue new regulations, and they would be required to terminate existing regulations. For instance, with the petition process for rule review, any party could drag an agency into court over an existing rule to force the agency to review the rule within 3 years. Even if the agency had already put the rule on its 10-year review schedule, it would still have to fight it out in court or put the rule up front. Court cases of this type generally drag on for a couple of years or more. Perhaps after an agency had had its 10-year-review schedule out for a few years, it might finally be past court challenges, but the breathing spell would be short. The reason is that the amendment would require agencies to start the whole process over again every five years.

The Dole/Johnston amendment is a lawyer's dream and a consumer's nightmare. Lawyers working for unethical companies that put their profits ahead of the health and safety of Americans would be given nearly limitless opportunities to file legal challenges to any rule. They could allege that a cost-benefit analysis or risk analysis was faulty, and force a court review; they could allege that an agency made a mistake in not listing a rule, or put it too late on its review schedule, and force a review; they could force an agency to consider whether an alterative method of compliance should be allowed; they could make appeals both during and after the final promulgation of a rule; and they could even make agencies review non-rules, such as free-standing risk assessments and advisory statements. This is not a recipe for reform--it is a recipe for regulatory hash. Nearly 20 years ago the Toxic Substances Control Act was enacted. That Act was supposed to become the standard for all future regulations. Its requirements for cost benefit analysis, risk assessments, selection of least-cost options, and judicial review are nearly identical to the requirements found in the Dole/Johnston substitute amendment. Not one single regulation has been enacted under the terms of that Act. The EPA tried once. It spent 10 years developing a rule, and then had a court throw it out because it "only" considered 5 options.

Our colleagues desire to rein in regulatory abuses is understandable. Every Senator is painfully aware of some of the excesses that have occurred. However, they need to be mindful of the fact that we need regulations. Congress does not have the expertise to enact laws in the detail that is needed to provide adequate protection. Congress provides the policy, but regulators must develop practical ways to implement it. The Dole/Johnston amendment, in sum, is an overreaction to regulatory abuses. It would make it impossible for regulators to implement Congress' intent. The Glenn/Chafee amendment, on the other hand, would act with precision to cut out the abuses without destroying the ability to regulate. The Glenn/Chafee amendment, therefore, should not be tabled.

Those opposing the amendment contended:

The Glenn/Chafee amendment is not a vehicle for regulatory reform. It does not go backward--its regulatory review proposals are useless. It does not go forward--its proposals for making new regulations less burdensome are equally useless. When one looks under the hood of this amendment, the reason is obvious: with ineffective judicial enforcement, it has no engine. With zero horsepower, this amendment is a worthless, do-nothing gimmick designed to give Senators cover for voting against real reform.

Every President since President Ford has required regulatory agencies to perform cost-benefit analyses and risk assessments of their proposed major rules. Every President since Ford has been routinely ignored by regulators. For example, according to an April 1995 study by the Institute for Regulatory Policy, of the 222 major Environmental Protection Agency (EPA) rules issued from April to September 1994, only 6 passed cost-benefit muster (they were promulgated anyway). Further, of the 510 regulatory actions published during this period, 465 were not even reviewed by the Office of Management and Budget as required by President Clinton. Of the 45 rules that were reviewed, not one was returned to an agency as required for having failed the obligatory cost-benefit

analysis. The problem is that regulatory agencies have too much authority. For the past 20 years they have deliberately ignored presidential orders secure in the knowledge that they cannot be forced to comply.

The fundamental flaw of the Glenn amendment is that it would not force agencies to comply. Without strong enforcement provisions it is doomed to failure. Under current law, agencies' final proposed rules can be challenged under the arbitrary and capricious standard before they are promulgated. Failure to have conducted a cost-benefit analysis or risk assessment is not a basis for challenging a rule. Under the Dole/Johnston amendment, agencies would be required to perform cost-benefit analyses and risk assessments of major rules and of rules having a significant economic impact and to use those analyses in their rulemaking. Most importantly, a rule would be challengeable if an agency's analyses were so faulty that they changed the outcome of the rulemaking or if the agency failed to perform the required analyses.

Under the Glenn/Chafee amendment, on the other hand, all regulatory agencies would be required to perform cost-benefit analyses of proposed major rules, and some of them would be required to perform risk assessments, but none would be required to use them as decisional criteria in making its rules. The analyses would be part of the record, just as comments from the public are part of a rule's record, but they would carry no more weight than an agency at its discretion cared to give them. When someone then made a challenge of a proposed rule, the Glenn/Chafee amendment would only allow one new cause of action--an assertion that a required analysis was not done. The amendment would absolutely forbid any examination of the adequacy of an analysis. Any slap-dash, shoddy study could be used, reaching any conclusion. Even if an analysis showed that the costs of a regulation did not even remotely justify its costs, and even if Congress had expressly provided in the underlying legislation that any regulations promulgated pursuant to it must justify the costs, the analysis could not be used. For analyzing new rules, therefore, the Glenn/Chafee amendment barely does more than restate current law--it would create an enforceable requirement to have more analyses done for the record, but there would be no enforceable requirements to make those analyses adequate or to make agencies pay any attention to them. Agencies, at their discretion, would be free to decide whether to make certain that their rules were not unduly burdensome. Agencies already have that discretion, and they abuse it.

The amendment would utterly fail to force a review of existing burdensome rules as well. At present, no bar exists to agencies reviewing their existing rules to determine if they make sense. This right to review is not commonly exercised. The Dole/Johnston amendment, accordingly, would force agencies to develop a list of their rules which they would be required to review within a 10-year period. If an agency failed to list a rule which regulated parties thought was burdensome, those parties would have the right to take the agency to court to force a review. They would have a significant standard to meet: they would need substantial evidence that the rule does not justify its costs. An agency would then be forced to review the rule to see if it should stand, fall, or be revised.

The Glenn/Chafee amendment, though, would do no more than order an agency to draw up a review list. A challenge could be made to force an agency to draw up a list, but no challenge could be made regarding the contents of a list. An agency could list 50 rules, 10 rules, or 0 rules and no one could challenge its selections. Total discretion would be left with agencies, just as it is currently. Therefore, the Glenn/Chafee amendment would not force agencies to reform their existing rules. The amendment would not require agencies to use the best available science and analysis to make certain that their future rules justify their costs, nor would it require them to use the best available science and analysis to make certain their existing rules justify their costs. Instead, it would leave it entirely up to an agency to decide whether or not its rules make any sense. Of course, the fact that agencies currently have that discretion and abuse it is the reason why we have this bill before us.

Even if the Glenn/Chafee amendment had substantive enforcement requirements it still would not provide nearly the degree of reform that would be provided by the Dole/Johnston amendment. The Dole/Johnston amendment would reform the Administrative Procedures Act in accordance with suggestions by the American Bar Association and others so that parties would be able to participate more fully in the rulemaking process; the Glenn/Chafee amendment would not. The Dole Johnston amendment would reform the Delaney Clause and allow petitions for alternative methods of compliance, for review of free-standing risk assessments, and for review of chemicals on the Toxics Release Inventory; the Glenn/Chafee amendment would not. The Glenn/Chafee amendment, unlike the Dole/Johnston amendment, would not even reform the current system to stop people from being fined by agencies for taking actions that the agencies previously assured them were in accordance with their regulations.

During the course of this debate several Senators have falsely asserted that the Glenn bill is essentially the Roth bill which passed the Governmental Affairs Committee by a unanimous vote. Senator Roth himself categorically denies this claim. According to Senator Roth, that bill was a product of compromise, but it was still much more substantive than the figleaf Glenn/Chafee amendment. Like the Dole/Johnston substitute, it provided for substantive review of existing rules. In fact, it required agencies to review every existing major rule they had within a 10-year period. Further, like the Dole/Johnston substitute, it provided for effective use of cost-benefit analyses and risk assessments for future major rules by providing that the cost-benefit analysis and risk assessment for a rule, to the extent relevant, would be considered by a court in determining the legality of an agency's action. The Glenn/Chafee substitute, as already described, would specifically forbid such consideration by a court.

Both proponents and opponents of S. 343 have publicly demurred that regulatory reform is necessary. No Senator wants to go on record as supporting the current system which costs the average American family $6,000 per year. However, many Senators seem willing to let their actions stray from their rhetoric by supporting the do-nothing Glenn/Chafee amendment. For our part, we will not support the status quo. We therefore strongly oppose this amendment.